2

No. 2941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE QUICKSILVER MINING COMPANY
(a corporation),
Defendant and Plaintiff in Error,
vs.
C. P. ANDERSON,
Plaintiff and Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

A. H. JARMAN,
Attorney for Plaintiff in Error.

PERNAU PUBLISHING COMPANY

No. 2941.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE QUICKSILVER MINING COMPANY
(a corporation),
Defendant and Plaintiff in Error,

vs.

C. P. ANDERSON,
Plaintiff and Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

The Case.

Defendant in error sued to recover for services alleged to have been rendered at the request of plaintiff in error in the organization of two corporations, to-wit: Senonac Power Company of California, hereinafter designated as "Power Co." and San Jose and Almaden Railroad Company, hereinafter designated as "Railroad Co.," for securing options for the purchase of property, rights of way, water rights and for the doing and performing of such other matters and things as were from

time to time required of him in connection with the purposes for which said corporations were organized. His services were performed both prior to and after the organization of said corporations.

He alleged that he was employed by Charles A. Nones, president of the board of directors of The Quicksilver Mining Co., hereinafter designated as the "Mining Co." He alleged that Nones was president, agent and general superintendent and that the act of Nones in employing him for the aforesaid purposes was and is the act of the Mining Co. and that therefore it is liable to him for said services.

(Tr. pp. 1-9.)

The Mining Co., by its answer, denied that it ever employed Mr. Anderson to perform the services set forth in his complaint, and further averred that it never authorized any employee, agent or officer to employ him for any purpose whatever and that no agent, employee or officer was ever authorized or ever had authority or power to make any contract of employment with him for his services in connection with said Railroad Co. or said Power Co., or either of them; and further averred that the organization of said corporations was unauthorized and that their purposes were and are without the power of the Mining Co. to legally execute or authorize; in other words,—*ultra vires.*

(Tr. pp. 22-35.)

Upon the issues thus framed the cause came on for trial before the court, a jury having been waived. Judgment was ordered for defendant in error for the full amount sued for, the judgment being based upon findings of fact and conclusions of law, duly given and made.

(Tr. pp. 37-43.)

The case comes to this court on writ of error to U. S. District Court for the Northern District of California, Hon. Benj. F. Bledsoe presiding. The record is preserved by bill of exceptions.

Specification of Errors.

Our objections to the findings and the judgment of the court below are based upon the fact that there is no evidence in the record that the Mining Co. employed Mr. Anderson to do any work or perform any services for or in its behalf in connection with the Railroad Co. or Power Co., nor is there any evidence that it *impliedly* conferred authority on Nones to undertake in its behalf the organization of said Railroad Co. and said Power Co., or to perform any service of any kind or nature in relation thereto.

A few of the many assignments of error will suffice to advise the court of our contention and enable it to intelligently follow the argument. For convenience we quote:

There is no evidence:

"(a) That defendant's alleged agent, superintendent and president * * * was ever authorized by defendant, expressly or impliedly, to employ plaintiff (Anderson) for any purpose or service whatever connected with or related to any business in which defendant was engaged or had any right to engage."

(Tr. pp. 275-276.)

"(b) That defendant ever held said Nones out as its general agent or representative with authority to bind it in any matter or thing outside of its usual and ordinary business of mining and producing quicksilver."

(Tr. p. 276.)

"That said judgment so entered was contrary to and is against law for the reason that there is no evidence:

(a) That said alleged employment of plaintiff by said Nones was within the limits of the authority conferred upon the said Nones as president of the defendant corporation.

(b) That defendant never at any time ever held said Nones out to plaintiff, or to the public, as having authority to employ plaintiff to undertake or perform any service in connection with said railroad or power enterprises."

(Tr. pp. 278-279.)

"That said judgment, so entered as aforesaid, was contrary to and is against law because the undisputed evidence in the case conclusively establishes:

(a) That said Nones had no right or authority, express or implied, to employ plaintiff

in behalf of the defendant to perform any work or service in connection with said railroad enterprise or said power enterprise, or either of them.

(b) That said alleged railroad enterprise and said power enterprise were and are *ultra vires* and beyond the corporate powers of this defendant.

(c) That defendant never at any time ratified and approved the said alleged employment of plaintiff by said Nones.

(g) That defendant did not habitually suffer Nones to exercise powers in relation to any matter outside of the usual and ordinary business in which defendant was engaged."

(Tr. pp. 279-280.)

The questions to be presented and involved in this appeal are simple, yet in order to present them fully, it will require a full presentation and consideration of *all* the evidence in the case bearing on the disputed question, to-wit: the *authority* of Nones, as president of the Mining Co., to bind it by contract for services rendered by Anderson for the benefit of the Railroad Co. and Power Co.; independent corporations organized and existing under and by virtue of the laws of the State of California.

The Mining Co. concedes that Nones employed Anderson to do certain work in connection with said companies and so far as this case is concerned, the extent and nature of the services rendered are not controverted and rest solely upon the testimony of Anderson himself.

At the outset, and before entering into an analysis of the evidence, we direct the court's attention that there is no dispute of fact as between the parties. All the evidence was put in by defendant in error. Whatever conflict there is might be said to be intrinsic. A conflict under such circumstances goes to the weight of the evidence and all other things being equal, must be construed against the party introducing it. This question will be fully considered hereafter.

Without waiving or minimizing the importance of what might be termed the incidental legal questions, the one real question for determination is, whether the Mining Co. impliedly authorized or conferred authority on Nones to undertake, in its behalf, the railroad and water enterprises in which matters the services were rendered. This involves the legal problem whether the Mining Co. had any power so to do and its liability, if any, for *ultra vires* acts of its officers.

It is conceded that there was no express authority conferred on Nones by the Mining Co. to employ Anderson for any purpose nor was the employment of Anderson ever authorized or ratified by the Mining Co. Mr. Anderson had no dealings with the Mining Co. All his dealings in relation to the matters in controversy were had with Nones.

The theory of the trial in the court below is clearly indicated by the rulings on objections made to evidence offered in the nature of declarations

made by Nones to Anderson relative to the question of *authority,* and by the opinion of the court in awarding judgment in favor of the defendant in error.

Though we realize it is somewhat of a repetition and perhaps unnecessary we quote the record in the matters just referred to, as it clearly sustains our contention.

> "Mr. JARMAN. I desire now to interpose an objection to the form of this question in that Nones' declarations can not bind this defendant; in other words, there must be something else in the record other than Nones' declaration in order to bind the defendant as to Nones' acts.
>
> The COURT. Yes, and that would seem to be well taken; *you can not prove an agency by the declarations of an agent, extra judicial declarations.*"
>
> (Tr. p. 74.)

> "The COURT. The keystone of your arch is,—there being an agency proven,—there is no doubt about there being an agency,—*the question is whether or not there was authority to do the things that are sought to be charged against the defendant.* If that has been proven then the act,—and I apprehend this would be a part of the *res gestae* in so far as that goes, a declaration as to part of the conduct of the defendant *acting within the scope of his authority* and of course, it would be admissible against the principal. *Whether or not that has been proven,* I am not prepared to pass upon, because I do not know all of the proof * * *".
>
> (Tr. pp. 75-76.)

"Mr. JARMAN. I will ask counsel if the question framed is limited to the matter indicated by your Honor, not for the purpose of proving agency or authority, but simply for the purpose of proving a part of the *res gestae.* I have no objection to that. *I do object to it being introduced in favor of the alleged agency or in proof of the authority to do an act.*

The COURT. *It would seem to me that your position is incontrovertible in that respect.* * * * *The question is, did he have authority to bind the corporation in the matter of organizing these corporatins.*"

(Tr. pp. 77-78.)

"The COURT. If counsel have no objection to its admissibility within the limitation suggested by the court, which is to the effect that it will be considered by the court *only* in the event *that other evidence proves the existence of the agency* as claimed by the plaintiff, it can be admitted."

(Tr. p. 79.)

During the cross-examination of the witness Brassy, upon objection made by counsel for plaintiff in error, counsel for defendant in error, in addressing the court, said:

"the defendant corporation permitted the people of the community to believe that he (Nones) had full power and authority to contract for the services of Mr. Anderson; that these facts were known to the plaintiff; now, *the defendant corporation held out the fact to the public that Mr. Nones had this authority;*

The COURT. *Of course, that is the question that we have to try, whether they did hold him out;* if they did, you are no doubt en-

titled to a commission; if they did not, another question is presented. *The question is, can you prove they held him out; that has never been brought home to the corporation itself."*

(Tr. p. 105.)

"The COURT. But you are now seeking by this offered evidence here, as I gather it, to show something done by Nones which was brought to the attention of the plaintiff and presumably upon which the plaintiff, himself, relied, *but you do not in your offer seek to bring it home to the corporation.* * * * If such agency was not established then you could not establish it by showing something that transpired between the president of this corporation and a third person, upon which event the plaintiff did rely *unless you bring it home to the corporation and establish in some way cognizant of that fact or, through its negligence in permitting the acts to be done, it was responsible therefor."*

(Tr. pp. 106-107.)

"Council for defendant very properly indicated that the only question to be tried was the one of the authority of defendant's president to employ plaintiff, and defendant's obligation to compensate him for the services rendered in response to such employment."

(Opinion District Court, tr. p. 45.)

The Facts.

For convenience and clarity we deem it advisable to consider the Railroad and Power projects separately. We will first present the facts

relating to the railroad. This will be done in chronological order that the court may be advised of the part taken by the Mining Co., either expressly or impliedly, conferring authority on Nones to engage in this enterprise.

The Mining Co. is a corporation, organized by special Act of the Legislature of the State of New York, on April 10, 1866. The substance of the incorporation Act relevant to this inquiry is as follows:

> "Sec. 1 * * * are created a body politic by the name, style and title of The Quicksilver Mining Company, and by such name and title shall * * * be capable of * * * granting and receiving in its corporate name, property, real, personal and mixed, and of holding and improving lands in California, or elsewhere, *and to obtain therefrom any and all minerals and other valuable substances, whether by working or mining, leasing or disposing of the privileges to work or mine such lands,* or any part thereof, and to erect houses and such other buildings and works *as may properly appertain to such business,* and to use, let, lease or work the same, and to dispose of the products of all such lands, mines and works, as they may deem proper."
>
> "Sec. 2. The said Company shall have power to make such By-Laws as they may deem proper to enable them to carry out the objects of the corporation * * * and to regulate and prescribe in what manner and form their contracts and obligations shall be executed."
>
> (Tr. pp. 261-2.)

Its By-Laws provide:

"Art. IV. Certificates of stock, amounting to ten millions of dollars, shall represent the value of the property of the corporation and the capital stock shall be divided into one hundred thousand shares of One Hundred Dollars each. Certificates of stock, upon which Five Dollars per share shall be paid, shall be distinguished as Preferred Stock."

"Art. VIII. *The corporate powers of the Company shall be exercised by a Board of Directors and such officers and agents as they shall appoint.*"

"Art. XIII. The Directors shall have the power to delegate, from time to time, such authority as they may deem necessary, to the officers, or the Company, or to any one or more members acting as a Committee, in order that the business of the Company may, at all times, be transacted with promptness and dispatch."

(Tr. pp. 263-4.)

From the time of its incoporation the Mining Co. has owned and operated and now owns and operates certain mining properties situated at New Almaden, Santa Clara County, California, being generally known and designated as New Almaden Quicksilver mines.

From June, 1909, to June, 1913, C. A. Nones, a resident of New York, was a member of its board of directors, and president of the company, and one M. A. Bowe, also of New York, was secretary.

From June, 1910, until June, 1913, J. F. Tatham was also a member of the board of directors, treasurer of the company and general manager, and as

such had charge of the company's properties in California; attended to its business and took charge of its product, to-wit: quicksilver, shipped same, collected and received, as treasurer, all moneys realized from sales thereof.

THE RAILROAD COMPANY.

Mr. Anderson testified that in *May, 1911,* Nones came to his office in San Jose and stated that better transportation was absolutely necessary for the mines, etc., and asked him how he thought the people living along the line between San Jose and Almaden would entertain a proposition, that is, in the way of giving rights of way. He, Anderson, told him that he thought the people would be very glad to do something. Nones said:

> "*To-morrow morning* you go out and see as many as you can of the owners nearest the Mining Company's property and arrange for a meeting."

Anderson immediately interviewed the residents and arranged for a meeting at the Pioneer school for 8 o'clock the next evening. Nones addressed the meeting, stating that *he* contemplated building an electric line; that there would be no stock sold; that the Mining Co. would pay for the building of the road and take all the stock, etc.

(Tr. pp. 63-65.)

Nones said that he depended entirely on him to procure the rights of way and franchises and *that the Mining Co. would pay him for his services.*

(Tr. pp. 65-66.)

A committee of citizens was appointed to work with Anderson. The matter was canvassed and discussed with the people living along the line. Anderson worked continuously on the railroad project from *May* until the end of *July, 1911,* when he asked to have a preliminary survey made, as he wanted to know *whether the line would be feasible* from an engineering standpoint. He told Nones so and Mr. Hermann was employed to make a preliminary survey.

(Tr. pp. 66-7.)

Mr. Hermann worked on the railroad project, surveying, etc., from *August 7, 1911,* to *January 13, 1913.*

All franchises were applied for in Anderson's name and bid in by the Railroad Co. (It is not pretended that the Mining Co. was in any way directly connected with these matters or that it had any knowledge thereof.)

(Tr. p. 71.)

On *September 6, 1911,* Nones addressed a letter to Mr. Schumann, chairman of said committee. This letter, written at New Almaden, California, is in every sense of the word, *a personal letter* from Nones to the committee and does not purport on its

face, directly or indirectly, to have been made by or in behalf of the Mining Co.

Such expressions as "has submitted to me," "my proposition," "arrangements with me," "will deliver to me the cash collected upon subscription in a sum not less than $4500," "convey to me or my assigns," "that I or my assigns," "after the receipt by me,"—are used.

(Tr. pp. 68-70.)

Nones stated in the letter that the commencement of building the railroad would not be later than *December 6, 1911.* We direct the court's attention that up to this time, to-wit, September 6, 1911, the question of the proposed railroad had never been presented to, or considered by, the board of directors of the Mining Co. After writing this letter on September 6, 1911, Nones evidently returned to New York, for we find, on consulting the minutes of the Mining Co., that on *September 20, 1911,* a meeting of the board of directors was held at the company's office in New York, at which he was present and read a paper regarding a proposed electric road to be built from San Jose to Almaden.

(Tr. pp. 240-248.)

This report is the first mention in the Mining Co.'s Minutes of the proposed electric road. We quote that which is pertinent, to-wit:

> "There have been several meetings on this matter with the residents of the valley who

are unanimously in favor of this undertaking *and have so far subscribed in cash about $10,000.* This being a donation for which they will receive neither stock nor bonds of the proposed road. I believe this donation will amount to $15,000 before the road is built.

Besides there has been *granted to me personally* for about three-fourths of the distance a private right of way of twenty feet in width and also sufficient land for turnouts and stations. The balance of the right of way necessary will have to be acquired from the County and will cost a few hundred dollars.

I am of the opinion that *if* a Company were formed to operate and build this line, that the line could be built by a certain contractor, with whom I have talked in San Jose, upon the following terms: * * *

This proposition is worthy of the most serious consideration. I have devoted several months to it and have obtained the approval of the majority of the property owners whose lands are along the proposed line of the railway."

After the reading of this paper, and on motion of Director Whicher, duly seconded,

"It was resolved that before taking action on an electric road to be built from San Jose to the mine, that the President furnish a complete specification showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the Board. Mr. O'Brien stated that he knew a competent engineer who could furnish such a report and he was requested to engage same."

(Tr. p. 142; 189.)

On *October 2, 1911,* the board of supervisors of Santa Clara County declared McAfee Road a public highway. According to Anderson this was done as the result of his work and was necessary in order to straighten out the proposed right of way.

The next event in point of time, other than the continued services of Mr. Anderson, as testified to by him, is the organization of the San Jose and Almaden Railroad Company, duly incorporated on *October 19, 1911,* a copy of the Articles of Incorporation being in evidence. A mere reading of same should be sufficient to convince any one *that the powers and purposes of this corporation are not included within the charter of the Minng Co.*

(Tr. pp. 222-3.)

'At the time of the incorporation Nones was in California, as he signed and acknowledged the Articles of Incorporation as one of the incorporators in San Francisco. But one meeting of the board of directors of the Railroad Co. was held, to wit, on *October 20, 1911.* One hundred and twenty (120) shares of stock were issued, to-wit, one hundred and seventeen (117) shares to Nones, and one (1) share each to Anderson Tatham and Brassy, and *no transfer* was ever made on the books of the Railroad Co. to the Mining Co. The stock was not even issued to the parties named as trustees.

Mr. Anderson continued in his work and secured subscriptions from the property owners along the

right of way and actually collected and deposited in bank a little over $4500, which was to be paid to the Railroad Co. upon the completion of the road. This money was collected and deposited in bank prior to March 5, 1912.

On October 17, 1911, Tatham, as treasurer of the Mining Co., paid to himself as treasurer of the Railroad Co., the sum of $1200. He had no authority to do this other than the demand of Nones and admits that he was not authorized by the board to do so.

During the month of October the Railroad Co. loaned the sum of $1050 to the Mining Co.

(Tr. pp. 121-2.)

Shortly after the incorporation of the Railroad Co., Nones wired $2000 to Anderson, which he immediately paid to Tatham as treasurer of the Railroad Co. Tatham immediately credited the *tag account* "New York Office", of the Mining Co. with $2000. He frankly admitted that he had no authority to do this other than directions given him by Nones. The exact time of writing this money is uncertain but it was in October and subsequent to the incorporation of the company.

On cross-examination of the witness, Tatham, it was proved by the books of the Mining Co., which were in court, that on December 28, 1911, there had been expended of the Mining Co.'s funds to that date, for said railroad, the sum of $2073.24.

The books also proved payment of the company's funds for said railroad on account of payroll, as follows:

January, 1912	$ 152.16
February, 1912	263.15
March, 1912	793.75
April, 1912	66.13
A total to May 1, 1912 of	$1275.19

(Tr. pp. 122-123.)

Not a dollar of this money had been authorized by the board of directors of the Mining Co.,—in fact, the use of its funds by Nones and Tatham was not only unauthorized,—but unknown to it.

The books also proved that in June, 1912, there was

likewise expended	$150.00
In August	25.00
In September	160.00
In October	208.50
In December, 1912	280.20
A total of	$823.70

Not a dollar of which had been authorized nor even known to the Mining Co. until Klink-Bean & Company's report on April 22, 1913.

Other than the payment of the corporate funds of the Mining Co., as aforesaid, and the practical completion of Mr. Anderson's services, nothing of importance transpired until March 5, 1912, when

Nones delivered to Anderson in Mr. Burnett's office in San Jose, the following letter:

> **"New Almaden, Cal., March 5th, 1912.**
> **C. P. Anderson, Esq.,**
> **San Jose, Cal.**
>
> **For services rendered and to be rendered on the line of the San Jose and Almaden R. R., I hereby agree to pay you the sum of $4500, payable on completion of the road.**
>
> **Yours truly,**
> **Charles A. Nones."**

(Tr. pp. 81-83.)

Mr. Anderson testified that Nones said at the time that he thought it (his services) was worth all the money that had been collected along the line in the way of cash subscriptions, which was the sum of $4500,—hence the amount due Anderson was arbitrarily fixed at $4500.

On May 1, 1912, Nones was in New York and attended a special meeting of the board of directors of the Mining Co., from which the following appears:

> "Moved and approved that the President's action in ordering the sum of approximately $3000 to be charged to March expenses, said sum representing the amount of money actually expended upon right of way, surveys and cutting down grade for the proposed San Jose and Almaden road, all of which stock will be owned by The Quicksilver Mining Company.
>
> Further resolved that the President's action be approved in receiving the stock for account of The Quicksilver Mining Company from the San Jose and Almaden road for the full amount of these expenses."

Mr. Anderson testified that he never heard of the action taken by the board of directors at this meeting until the depositions in this case were filed with the clerk, and also that he did not know of the action taken by the board at the meeting held on September 20, 1911.

Thus, up to this time, May 1, 1912, no affirmative action had been taken by the board of directors of the Mining Co. relative to the said railroad, which in any way sanctioned or authorized Anderson's employment or which authorized or directed Nones to engage in this railroad enterprise.

The resolution of May 1, 1912, approving Nones' expenditure of $3000, is of no importance in this case and does not concern or affect Mr. Anderson for the reason that it was not known to him and he did not rely upon it; furthermore he testified that his part of the work had been completed at that time.

> "Q. What else, if anything, was done by you, Mr. Anderson, after the procuring of these rights of way and franchises and the organization of the corporation?
>
> A. *We were waiting for Mr. Nones, or The Quicksilver Mining Company to furnish the money to go ahead and construct the road.* I had nothing to do with letting any contracts or anything, because they were never let. *All I had to do was to furnish the franchises and the rights of way.* Several contractors were taken over the line and figures were obtained as to the cost of construction.
>
> Q. The only services you were to render were to procure the rights of way and the franchises?

A. The rights of way and the franchises.

Q. What did you finally accomplish in that regard, as between the City of San Jose and the terminal of the road?

A. The entire line was complete so far as the rights of way and franchises were concerned. They were ready for construction to begin at any moment.

Q. Did Mr. Nones return to San Jose subsequent to the completion of your work or at the time of the substantial completion of it?

A. Yes. During March of 1912 he was here and spent quite a long time here; a couple of months or perhaps longer."

(Tr. pp. 80-81.)

Mr. Anderson's name *does not appear* on the minutes of the Mining Co. *prior* to May 1, 1912.

Mr. Swayne, a director of the Mining Co. during the entire period, testified that he never heard of Anderson save and except in connection with the sale of the New Almaden store, which was taken up for the first time at the meeting of May 1, 1912. Mr. Swayne testified that he first heard of Anderson's claim when the present action was commenced.

"Q. *You knew that the project of an electric railway line to connect the works with the City of San Jose was a project initiated for the benefit of the defendant company, didn't you?*

A. *I knew that the plan was discussed; it was never authorized.*

Q. *Was it ever objected to?*

A. *Yes, seriously.*

Q. *By whom?*

A. *By Mr. O'Brien, Mr. Stern and myself.*"

(Tr. pp. 142-3.)

"Q. Mr. Swayne, you were questioned with regard to a resolution appearing at page 341 of defendant's Exhibit '1' for identification, being the Minute Book of The Quicksilver Mining Company, referring to an electric road, where it is reported that Mr. O'Brien stated that he knew a competent engineer who could furnish such report. Was this engineer, referred to by Mr. O'Brien, retained by the company?

A. Not that I ever heard of.

Q. Did Mr. O'Brien resign after that?

A. Shortly after that, yes."

(Tr. p. 148.)

Anderson admitted that during the Nones' administration, he did not write any letters to the Mining Co. in New York and that he did not receive any letters from the company,—thus its board of directors is and must be relieved of responsibility on account of any express authority conferred on Nones.

The next event of importance in this case is a regular meeting of the board of directors held on December 12, 1912. Stockholders, owning of record twenty-five per cent of the capital stock, demanded that a special meeting of stockholders be called for the purpose of acting upon the general business of the company.

The meeting was adjourned to December 18, 1912, at which time a special meeting of stockholders was authorized to be held on the second Wednesday in February, 1913.

The minutes of an alleged regular meeting of the board, held on February 11, 1913, are interesting and inasmuch as they are short, we quote same:

> *"February 11th, 1913.*
> *Regular Meeting called February 11th in place February 12th, at 3:30 P. M.*
>
> Present: C. A. Nones, M. A. Bowe and J. F. Tatham.
>
> Mr. Tatham having come on from California to present the annual report to the Board of Directors and to report on any matters concerning which the Board might desire information.
>
> There being no quorum, the meeting adjourned."
>
> (Tr. p. 254.)

The special meeting of stockholders was held on *February 15, 1913.* A stenographic copy of the proceedings was introduced in evidence by Anderson.

(Tr. pp. 224-230.)

Nones' relations with his stockholders are revealed by parts of his cross-examination, which are quoted, to-wit:

> "Q. During that time were you not interested in the reproduction of the colloquy and the colloquies that took place *between the disgruntled stockholders and yourself* on that occasion.
>
> A. No, Mr. Blandy, I was something like David Harum's flea-bitten dog; the fleas kept him so busy scratching that he didn't have time to think of his other troubles; I was something like that dog.

Q. David Harum says fleas are good for a dog, doesn't he?

A. I am not a dog.

Q. Well, there can not be much doubt but that on the 15th day of February, 1913, there was a special meeting of stockholders held at 45 Broadway.

A. There is no doubt about that; that is undoubted.

Q. You called that meeting?

A. I did.

Q. You were in the chair?

A. I believe so, yes.

Q. *Until you were ousted?*

A. *Until I was ousted.*"

(Tr. pp. 181-182.)

"Q. You have no recollection that a motion was put to remove you as President at that meeting?

A. I have a very vivid recollection of it.

Q. *There was considerable acrimony on that occasion?*

A. *Almost.*

Q. *You were in a very unpleasant condition?*

A. *Something like the dog.*

Q. *Yes sir, but you held your ground, notwithstanding?*

A. *About ninety days.*"

(Tr. p. 182.)

"Q. Now, Mr. Nones, this was a very acrimonious meeting; you were in the chair as President and the meeting had been called by you and turned into a meeting evidently in the interests of the disaffected stockholders, and you mean to tell me that that has passed clean out of your mind?

A. Absolutely, Mr. Blandy.

Q. Do you remember this question being put to you by Mr. Harby:

'Q. (Mr. HARBY) I would like to ask if the Company obtained a charter for the building of a railroad?

The CHAIRMAN. No, sir.

Mr. HARBY: Was anything expended on account of obtaining a charter?

The CHAIRMAN: Yes, about $3500.

Mr. HARBY: I would like to ask how that was expended?

The CHAIRMAN: That was expended under the direction of counsel, Mr. Burnett, of Wilcos and Burnett of San Jose.

Mr. HARBY: For what purpose?

The CHAIRMAN: For the purpose of obtaining rights of way for the New Almaden and San Jose Railroad, of which The Quicksilver Mining Company owns all the stock.

Mr HARBY: This road you mentioned is an incorporated affair?

The CHAIRMAN: Yes, sir.

Mr. HARBY: And the stock has been transferred to The Quicksilver Mining Company?

The CHAIRMAN: Yes, sir.

Mr. HARBY: But a franchise for the road has not been obtained?

The CHAIRMAN: It has, but not in the name of The Quicksilver Mining Company; in the name of the New Almaden & San Jose Railroad Company.'

Q. Do you remember that little colloquy between yourself and Mr. Harby?

A. I do not remember it, Mr. Blandy, but to my best knowledge and belief I confirm what I said in answer to those questions.''

(Tr. p. 183.)

''Q. You had the ordinary intelligence to understand a question when it is put to you?

A. I understood it according to my own light.

Q. *You, as president, were under fire?*

A. *I am not the first president that has been under fire.*

Q. *But you knew you were under fire, didn't you?*

A. *Certainly I knew there was disagreeableness.*

Q. And they wanted information as to The Quicksilver Mining Company's affairs, that is what they wanted, isn't it?

A. I do not know what they wanted."

(Tr. p. 185.)

This evidence is important in this case only as showing the attitude of the stockholders of the Mining Co. toward Nones, and the attitude of Nones toward the company. A reading of same will convince the most skeptical, that the stockholders were ignorant of the things which Nones had done in California and reveals clearly that he attempted and was doing things without authority and beyond the powers conferred upon him by reason of his office as president.

A meeting of the board of directors of the Mining Co. was held on *February 18, 1913,* at which a resolution was adopted authorizing an investigation of the books of account of the company by certified public accountants and the employment of a competent mining engineer to examine and make a report upon the mines and other physical properties of the corporation at New Almaden.

No further meetings of the board of directors were ever held and at the annual stockholders' meeting in June, 1913, a new board of directors was elected to succeed Nones and his board.

The result of the sensational stockholders' meeting of February 15, 1913, and the action taken by the board of directors, employing public accountants to examine its books and a mining engineer to examine its properties, became known to the public, and on April 2, 1913, the San Francisco "Chronicle" published the facts on the front page of the paper with sensational headlines.

(Tr. p. 219.)

This article was read by plaintiff. He was then advised that the stockholders of the company were not in accord with Nones and that they did not approve and sanction the things that he had been doing.

After being informed of the situation by the newspaper and after the appearance of the mining engineer and the accountants at New Almaden, all of which was known to him, and after learning of Nones' financial distress and inability to pay, Anderson handed a statement to Tatham for the first time on *May 19, 1913,* demanding $4500 for services rendered in the railroad project. This statement, alleged to have been delivered to Tatham, was never received by the Mining Co. and it never knew or heard of his claim for $4500 *until October, 1913,* when it received a written demand from him for the payment of this sum.

There is a *conflict in the testimony* of Anderson and Nones *on the question of authority,*—Anderson testifying that Nones engaged his services on behalf of the Mining Co., and Nones testifying that *Anderson was employed by him personally and not for and in behalf of the Mining Co.* We have given Anderson's testimony in reference to this subject. Inasmuch as Nones was his witness, the inconsistencies or contradictions of his witnesses should be called to the attention of the court and for this purpose we quote from Nones' testimony as follows:

> "Q. Did you ever ask him (Anderson) to carry on the business of any corporation anywhere?
>
> A. No, sir.
>
> Q. Did you ask Mr. Anderson to secure options for the purchase of property for a railroad for you?
>
> A. Yes.
>
> Q. Did you ask him to secure options for the purchase of rights of way for you for a road?
>
> A. I did.
>
> Q. Did you ask him to secure options for the purchase of property and options for the purchase of water rights and rights of way for you?
>
> A. *Yes, for me personally, not for the Company.*
>
> Q. *Did Mr. Anderson accept this employment from you personally?*
>
> A. *Yes.*
>
> Q. Did you have any agreement with Mr. Anderson with respect to his compensation?
>
> A. I gave Mr. Anderson a letter stating that he would be entitled to the sum of $4500

upon the completion of the railroad for the work he had performed and was about to perform and that was signed by me personally.

Q. *Did you not give that to him on behalf of the Company?*

A. *I did not sir, I was not authorized."*

(Tr. p. 152.)

"Q. Did you ever write any such thing to him?

A. The letter which I have written and which I have given you the gist of was signed by me personally and I would like to explain the cause of the letter and why it was written.

Q. Mr. Nones, you will please give the explanation you have in mind.

A. Mr. Anderson purchased for the railroad Company certain rights of way and it is my belief that upon every right of way that he purchased he received a commission paid by the railroad company for his services, but he was at some work and trouble in getting consents from property owners along the line. He received his expenses for these and in addition to these received a cash bonus, which was deposited in bank to be paid over to the railroad upon its completion of $4500. This $4500 was a like amount of $4500 *that I agreed to give Mr. Anderson personally, feeling sure that the Board of Directors when I placed it before that Board, would sanction the payment to him of $4500 but he had no obligation from the Company."*

(Tr. pp. 153-154.)

"Q. I understood you to say that $4500 was paid to him.

A. No, it was not paid to him.

Q. It was to be paid?

A. Yes, he had my personal letter and it was my intention to bring the matter up before the Board of Directors and then explain matters to them and allowing them to pay Mr. Anderson the $4500 out of the $4500 on deposit to the credit of the railroad company in San Jose.

Q. *That is, you hoped to obtain the authority from The Quicksilver Mining Company to pay Mr. Anderson the amount for which you personally obligated yourself?*

A. *That is correct, yes, Mr. Harby.*

Q. Did you ever fix the amount and value of the services that Mr. Anderson rendered to you?

A. No, I fixed it at $4500 arbitrarily, that being the amount of cash on deposit voted as a cash subsidy."

(Tr. p. 156.)

"Q. Did you say to him that he would be paid for services to be rendered to you at any special time, or upon any fixed event happening, when he was to receive the pay?

A. *Upon the completion of the railroad, when the subsidy came due.*

Q. *You explained to him then, did you not, that his pay depended upon the railroad being built?*

A. *Precisely."*

(Tr. p. 157.)

"Q. You gave Mr. Anderson a promissory note for $4500, did you not?

A. I do not think so, I think it was an agreement.

Q. *Did you ever give him a note of The Quicksilver Mining Company?*

A. *Never.*

Q. *Was it ever your intention to give him any note of The Quicksilver Mining Company?*
A. *It was not.*"

(Tr. p. 158.)

"Q. Mr. Nones, you were just asked a question on cross-examination which you said you could not answer without explaining the matter in full, referring, I presume, to the Anderson matter. Will you please make whatever explanation you have in mind?

A. *I had no authority to offer the $4500 under discussion to Mr. Anderson,* that being a Company matter and the $4500 being deposited in a bank in San Jose by people living along the right of way of the proposed railroad, *but I told Mr. Anderson that I personally would be responsible for the payment to him of the $4500 and that if the Company did not turn him over the $4500, I would.*

Q. Did you say anything to him at the time about what authority you had to deal with him?

A. *I told him I had no authority from the corporation to turn over the $4500 and that is the reason why, for his own protection, I made a personal contract.*

Q. He did that work at your request?

A. *He did that work at my request.*"

(Tr. p. 188.)

"Q. *Now, I want to know whether in dealing with Mr. Anderson you dealt fairly with him and let him know that condition of affairs,* or whether you concealed from him that you did not have the express authority by resolution of the Board to so employ him?

A. *Mr. Anderson knew that I had no authority to dispose of the $4500 whatsoever.*"

(Tr. p. 197.)

"Q. Whose debt were you guaranteeing the payment of?

A. I was foolish enough to guarantee a man, C. P. Anderson, to receive $4500, that is what I was doing. I assumed a foolish obligation so as to see Mr. Anderson succeed in business.

Q. Did you, in all this help have any personal uses of your own?

A. No, I wanted to build up The Quicksilver Mining Company."

(Tr. p. 203.)

"Q. Was anything stated in the letter, any event stated in the letter, which might prevent him receiving that $4500?

A. No, because at the time the letter was written I had every idea that the road would be built.

Q. *Then the thing you had in mind was that The Quicksilver Mining Company might not authorize his employment, wasn't that it?*

A. *Precisely, and might not authorize the $4500, I made that statement before.*"

(Tr. pp. 206-7.)

"Q. He never presented any bill to The Quicksilver Mining Company for the matters set forth in this complaint, in this action, while you were president?

A. *Never did.*

Q. Did Mr. Anderson send a bill to The Quicksilver Mining Company for $7411?

A. *Never to my knowledge.*"

(Tr. pp. 207-8.)

"Q. *Well, his employment must have been your own debt?*

A. *I always considered it as my debt.*"

(Tr. p. 209.)

No comment is necessary,—the conflict is obvious. The legal consequences resulting from such a condition of the evidence will be considered in the argument.

THE POWER COMPANY.

Such of the evidence stated in connection with the railroad project as is manifestly applicable to this company will not be repeated, but is referred to and incorporated with the following facts relating strictly to the power project.

Mr. Anderson testified that in the month of April, 1910, he had a conversation with Nones and Mr. Burnett concerning *certain options* which they desired him to secure.

> "Q. Did he indicate to you at that time the purpose of procuring these options?
> A. *He said it was for the purpose of getting control of the water in the canyon there for power purposes.*"
> (Tr. p. 54.)

Nones told him that he was very anxious to have him attend to the matter at once, and that he did not want any one to know about it until the deal had been consummated. *Anderson began immediately.* He looked over the territory, consulted with Nones and Burnett, interviewed property owners and secured options on several properties.

> "Q. Did you notify Mr. Nones of these options?

A. I notified Mr. Nones that I had these options."

(Tr. p. 56.)

"The COURT. *This report is addressed to Mr. Nones as an individual. Why didn't you address it to him as president of The Quicksilver Mining Company?*

A. *There was no particular reason. It never occurred to me.*"

(Tr. p. 100.)

In October, 1910, the plaintiff made a trip to Randsburg in order to secure an option on some property that was desired. He did so, and took same *in the name of C. P. Anderson & Co.,* and not in the name of Nones, or the Mining Co.

(Tr. p. 91.)

After securing the options nothing further was done by him. *He was waiting until such time that Nones felt was the proper time to take up this land.*

(Tr. p. 57.)

At a meeting of the board of directors of the Mining Co., held on September 20, 1911, Nones made a written report concerning water, in which he referred to the lease made with the County of Santa Clara, and in which he recommended that,—

"this Company should then transfer to the Water Company which is now in existence, *all of the water rights,* receiving in payment therefor all the stocks of the Water Company."

(Tr. pp. 240-48.)

Not a word is said in this report concerning Anderson's services, nor of any options secured by him. No reference is made to the *necessity* for acquiring other lands. All the information which the Mining Co. had was that it owned valuable water rights in California which, in the opinion of its president, could be sold for a large sum, reserving sufficient water for its use in its business of mining.

Upon reading this report a resolution was duly passed authorizing the president to sell and transfer these securities at a price of not less than $150,000 in cash, or its equivalent reserving, however, the right for all power to carry on the company's business, and for not less than 200,000 gallons of water per day.

On March 18, 1912, a special meeting of the board of directors was held, at which the resolution adopted on September 20, 1911, was rescinded, and the following resolution was adopted in its place.

> "Resolved that the officers of the Company be authorized to transfer to *Senonac Power Company all the water rights owned by The Quicksilver Mining Company,* together with a lease of the pipes of the County of Santa Clara. Said lease being for a term of fifty years, and in exchange therefor to receive all stock and other securities of the Senonac Power Company, and the *President is therefore authorized to sell and transfer these securities at a price of not less than $200,000, in cash,* or its equivalent, reserving, however, to The Quicksilver Mining Company the right for all

> power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day."
>
> (Tr. pp. 248-9.)

At the time of this meeting Nones was in California. *This is the first mention of Senonac Power Company,*—the word "Senonac" being the name of "C. A. Nones" reversed.

Senonac Power Company was incorporated under the laws of the State of California on March 19, 1912. Anderson testified as to the reasons for incorporating this company:

> "I think Mr. Nones stated that he had found out that the water was valuable and that the capacity of the old water company was not sufficient; he also stated at the time,—it was before the Public Utilities Act went into effect,—that he wanted to incorporate before that Act took effect. That was the object of incorporating the Senonac Power Company at that time. To increase the capital stock and have it incorporated before the Public Utilities Act took effect."
>
> (Tr. p. 60.)

A copy of the Articles of Incorporation is in evidence, some of the purposes of this corporation being:

> "To generate, manufacture, purchase and transmit electricity * * * for supplying * * * electric power * * * light or heat * * * to incorporated cities and counties * * * also for furnishing electricity for lighting, heating or power purposes."
>
> (Tr. pp. 220-221.)

In order to complete the statement of facts it is necessary to direct the court's attention to the evidence relating to the question of *authority,* and *particularly* that which Anderson *relied* upon and which he claims warranted him in believing that Nones was authorized to act for and bind the Mining Co. in these two enterprises.

On cross-examination he was questioned concerning this matter and testified as follows:

"Q. *And wanted you to go to work right away?*
A. *Yes, sir.*
Q. *And you started to work right away?*
A. *Yes sir.*
Q. *Did you ask Mr. Nones at that time concerning his authority to authorize you to do this?*
A. *Why no.*
Q. *You didn't question it?*
A. *No, I didn't question it.*
Q. *You proceeded to do the things that he requested you to do?*
A. *Yes, sir.*
Q. *And you continued to do anything that he requested along this line until your services were completed?*
A. *Yes, sir.*
Q. *In other words, so far as you are concerned, you never questioned his authority?*
A. *I did not.*"

(Tr. p. 87.)

"Q. So far as the work for the Power Company was concerned, *did you ever have any authority or receive any authority from the board of directors of The Quicksilver Mining Company authorizing you to do any of this work?*

A. *No, sir.*

Q. Did you ever make any inquiry from the board of directors, or from the secretary of the company, whether Mr. Nones had any authority to do this?

A. I did not.

Q. You simply proceeded to do as he directed you to do?

A. Yes, sir.

Q. *Is that true as to the services rendered by you as to the railroad company?*

A. *Sure.*

Q. You made no inquiry of the board of directors whether Mr. Nones had any authority?

A. I did not.

Q. *You* made no inquiry of the secretary whether any resolution had been passed authorizing Mr. Nones to instigate or commence the building of a railroad from San Jose to New Almaden?

A. No.

Q. So that, as I understand you, so far as you were concerned, the services which you performed and for which you now seek recovery, so far as the defendant is concerned, *all that you know about it is that Mr. Nones, who was the president of the corporation, requested you to do it and promised you would be paid?*

A. Yes, sir.

Q. Did you know, Mr. Anderson, of any other authority, or any authorization whereby you should act as the representative of The Quicksilver Mining Company for looking up options either for the Power Company or for the Railroad Company?

A. No.

Mr. HERRINGTON: I think there is no question about the proposition, Mr. Jarman, *it is conceded that his entire services were rendered on the instructions of Mr. Nones as president of The Quicksilver Mining Company and we*

knew nothing about any authorization which Mr. Nones had as such president."

(Tr. pp. 88-89.)

Early in 1910, and *prior* to rendering any services either in the Power or Railroad matters, Anderson prepared an estimate of what he thought some of the Mining Co.'s lands could be sold for and gave it to Nones. We quote his testimony in reference to this estimate:

"Q. You discussed it with him?

A. No, he said that he had seen the estimate *but that he would not know on that trip whether the land would be sold or not; he said I won't know anything about it until I come back to California another time.*

Q. What did he say?

A. *He said he didn't know whether the land would be sold until he had made another trip to New York."*

(Tr. p. 85.)

Thereafter Anderson was employed to sell certain lands belonging to the Mining Co. He did so and received commissions therefor. In October, 1910, he received $1000; in November $325.00, and other commissions from time to time thereafter.

(Tr. p. 86.)

Anderson testified that after making a sale he followed it up and saw that deeds were delivered to the purchasers and the money paid. He also testified that in the year 1910 *his attention was directed to a resolution passed by the board of directors of the Mining Company authorizing the*

sale of said lands and that this resolution was objected to by Mr. Burnett and that the board of directors had to pass another resolution, as the attorney representing one of the purchasers would not accept the deed.

> *"I was present when Nones and Mr. Burnett discussed the resolution that his board had passed for the sale of such land by which his board instructed him to sell but not to convey;* people objected that the word 'convey' had not been mentioned in the resolution."
>
> (Tr. p. 86.)

Anderson knew that Nones had to confer with some one in New York before he could offer the lands for sale and any person of ordinary sense would know from the language used, that he had to confer with and obtain authority from the board of directors.

He knew, therefore, prior to entering into negotiations with Nones that his authority was *not* absolute and unlimited.

Turning to the minutes we find that on August 17, 1910, a resolution was passed by the board authorizing Nones to sell certain lands belonging to defendant, as follows:

> "On motion of Mr. Benedict, seconded by Mr. Whicher, the following resolution was adopted:
>
> The President is authorized to sell up to 1400 acres of land belonging to the Company, it being understood that whatever sale of the property is made, all the mineral and other

rights would be reserved to the Company. The lands under consideration do not comprise the best lands owned by the Company and the President is authorized to fix a minimum price of not less than $65 per acre for these lands, which is approximately the value of same. It is possible that a better price may be realized."

(Tr. pp. 232-3.)

On September 7, 1910, and September 22, 1910, resolutions were adopted by the board relating to the sale of company lands.

(Tr. p. 233.)

On September 22, 1910, the board passed a resolution authorizing the president to make a contract for the rebuilding of No. 3 furnace; on November 16, 1910, sales of land were ratified and approved by resolution duly passed; on March 22, 1911, sales of land were ratified and approved and Nones was authorized and empowered to deal with the Eureka Company. On April 12, 1911, after Nones had read a paper regarding the "paint matter" the board, by resolution instructed Director Whicher to employ the services of an expert to investigate the matter; the president was authorized to negotiate for the purchase of an aerial tram, and the matter of repairs to the large house was discussed and the president instructed to submit approximate cost of repairs at the next meeting; on June 5, 1911, a committee was appointed to confer with the company's counsel regarding the paint situation; on September 20, 1911, Nones was authorized to expend the sum of $8000 for the

erection of a paint mill and at the same meeting, the board resolved *"that before taking action on an electric road"* that complete specifications, etc., be submitted to the board.

(Tr. pp. 233-248.)

Miss Bowe, secretary of the Mining Co., testified:

> "Controversies often came up. I can not remember just what was approved or disapproved; something that comes up is not always approved."
>
> (Tr. p. 213.)

The foregoing is quite sufficient to indicate that in all important matters, outside of the usual and ordinary routine of company business, *action was authorized by the board. No resolution was ever passed confirming authority on Nones to transact all company business.* He was merely a member of the board of directors and president of the company.

There is no evidence upon which to base an implied authority, furthermore the minutes expressly negative any such idea. All important matters, outside of the routine of business, were covered by resolution of the board, that is, *all matters of which the board had any knowledge.*

We particularly direct the court's attention to Nones' testimony concerning Anderson's employment in the Power project, to wit:

> "Q. Did you ask him to secure options for the purchase of property, and options for the purchase of water rights, and rights of way for you?

A. *Yes, for me personally, not for the company.*
Q. *Did Mr. Anderson accept this employment from you personally?* A. *Yes.*"
(Tr. p. 152.)

"Q. I also find an allusion made to some water rights.
A. Yes.
Q. Were they associated with the railroad?
A. No, sir.
Q. That was a new enterprise? A. Yes.
Q. *Was that your conception also?*
A. *Yes.*"
(Tr. p. 168.)

"Q. Anyway, so far as you are concerned, you did not put your personal obligation forward in respect to the water rights with him?
A. *I never made any contract with Mr. Anderson concerning water rights; never had any understanding with him concerning water rights.*"
(Tr. p. 172.)

Plaintiff had performed and had practically completed his alleged services in 1912, yet no bill for same was ever presented to defendant until October, 1913, after he was advised of Nones' financial misfortunes and the election of a new board of directors.

Comment on the evidence is not necessary. There is no ambiguity or uncertainty. He who reads can understand.

This is merely a case where the president of a corporation, without authority and for reasons of

his own, undertook enterprises which he contemplated would or might be useful to his company and anticipated that his action would be ratified and approved by the board of directors.

Anderson positively asserts that Nones employed him for the Mining Co., and Nones, equally positive, asserts that his employment was personal and not corporate,—that he had no authority to bind the Mining Co. and that Anderson so understood. Aside from this contradiction in the evidence we fail to understand how the court could accept Anderson's testimony over that of Nones in face of the documentary evidence in the case. Every paper and document, created when no controversy existed and when harmony reigned, corroborates Nones' testimony. How explain the written promise of Nones to pay Anderson $4500 for services in the railroad matter?

From the evidence we submit three inevitable conclusions:

1. That Nones was not authorized, expressly or impliedly, to employ Anderson.

2. That the Mining Co. has not ratified or approved Nones' unauthorized acts.

3. That said railroad and power enterprises were and are *ultra vires.*

These conclusions preclude recovery by Anderson for his services rendered in the railroad and power projects.

For the court's convenience we submit our argument and authorities covering the foregoing conclusions in the order named, to wit:

I. Authorization, Express or Implied.

II. Ratification.

III. Ultra Vires.

I.

AUTHORIZATION, EXPRESS OR IMPLIED.

The burden of proving his case rested with Anderson. It is not enough that he rendered services in good faith at the instances of the president of the Mining Co. This is not a case for services rendered in the usual and regular line of the company's established business. The judgment in favor of Anderson can only be sustained by proof that the Mining Co. had, expressly or impliedly, conferred authority on Nones to do the things upon which Anderson bases his right of recovery.

Unless a corporation expressly authorizes, or by act or deed holds out its agent as possessing the authority relied upon, one dealing with such agent does so at his peril.

Fontana v. Pacific Can Co., 129 Cal. p. 51.

Corporations are *not bound* by acts of agents *not* within limits of authority conferred on them

but are bound by acts of their officers and agents *within the scope of their apparent powers.*

10 Cyc., 935-938.

The mere fact that Nones was president of the board of directors conferred no power on him to bind the Mining Co.

> "The office itself, however, confers no power to bind the corporation or control its property. *The President's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it directly, or through its Board of Directors, formally expressed or implied from a habit or custom of doing business.*"

10 Cyc., 903, Note 67 and 68.

The president of a corporation "may acquire" larger powers than those ordinarily belonging to him *by being held out to the public as possessing them, and by being suffered by the directors habitually to exercise such powers in the face of the public.*

10 Cyc., 912.

The foregoing principles were recognized and applied by the Supreme Court of the State of California in the case of Black v. Harrison Home Company, 155 Cal. 121, in an opinion written by Mr. Justice Angellotti, in which he said, at page 126:

> "*It is an elementary principle of corporation law that a president of a corporation has no power merely because he is president, to bind the corporation by contract.* The man-

> agement of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has *only* such power as has been given him by the by-laws, and by the board of directors, and *such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation.* The general rule in this regard is stated in 2 Cook on Corporations, § 716, as follows: 'The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds, or management. This is a rule which prevails everywhere, excepting possibly in the State of Illinois. * * * It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract and accept the benefits of it, and thereby be bound. *But the general rule is that the president can not act or contract for the corporation any more than any other director.*"

There is no evidence in this case that the board of directors *habitually* suffered Nones to exercise powers in relation to any matter outside of the usual and ordinary business in which the Mining Co. was engaged. There is no evidence that the directors had any knowledge that Nones had engaged Anderson to perform services for the company in either enterprise.

If a corporate officer employs one to perform a service for the corporation and it is performed *with the knowledge of the directors, and the corpora-*

tion receives the benefit of such service without objection, the corporation is, of course, liable.

9 Cyc., 934-34, Note 36;

Hooker v. Eagle Bank, 30 N. Y. 83; 86 Am. Dec. 351;

Pacific Vinegar & Pickle Works v. Sidney M. Smith, 145 Cal. 352.

Before a corporation can be held liable for an "implied power" it must have consented to the appearance of power exercised by its agent, and this implies that the *corporation must have had knowledge of the acts of its agent.*

10 Cyc., 938;

Neuhart v. George K. Porter Co., 23 Cal. App. 526.

There is no evidence of habit or custom by the directors whereby Nones was held out to the public or to Anderson as possessing authority to bind the Mining Co. for services to be performed in a matter not only entirely out of and *different from its usual and ordinary business,—but in a matter entirely beyond the powers authorized by its charter.* There is no pretense of evidence indicating *knowledge by the Mining Co.* or its board of directors of Nones' alleged agreements with Anderson, nor of acquiescence by the Mining Co., or its board, after knowledge. The record discloses that the Mining Co. was not informed of Anderson's activities in behalf of either the railroad or power enterprise until long after his services were completed.

We take it that it requires no argument to convince this court that building a railroad and organizing and developing a power company is not the ordinary and usual business of a mining corporation. The doctrine of *implied powers or holding out* an agent as possessing the powers relied upon is not established by the evidence in this case for the reason that there is no evidence that the Mining Co. had any knowledge of the alleged authority exercised by Nones in relation to either enterprise, and there is no evidence that the corporation acquiesced in Nones' actions after being informed thereof, and finally, the power exercised was not in a matter that by any stretch of the imagination could be included within "usual and ordinary" business.

Prior to March 5, 1912, the board of directors did not father this railroad scheme directly or indirectly. Even then it was not advised of Anderson's employment nor of the services rendered by him, nor of its alleged liability by reason thereof. At this time his services were completed. In the report of Nones to the board of directors on September 20, 1911, he concluded as follows:

> "This proposition is worthy of the most serious consideration. I have devoted several months to it and have obtained the approval of the majority of the property owners whose lands are along the proposed line of the railway."
>
> (Tr. p. 248.)

The action taken by the board on the railroad matter speaks for itself:

> *"It was resolved that before taking action on an electric road to be built from San Jose to the mine, that the President furnish a complete specification showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the Board. Mr. O'Brien stated that he knew a competent engineer who could furnish such a report and he was requested to engage same."*
>
> (Tr. pp. 142, 189.)

Nones testified that Anderson's services were performed *at his personal request,* and not at the request or for the Mining Co. If Anderson was an innocent victim he must bear the loss. It is evident that the Mining Co. has already suffered a heavy loss by the wilfull misuse and waste of its funds for an unauthorized purpose and from which it has received no benefit whatever.

Likewise as to the Power Co., there is no evidence of knowledge by the Mining Co. that Anderson was about to secure, was securing, or had secured options on lands for the purpose of controlling the waters of any canyon. There is no evidence that the Mining Co. ever knew or heard of Anderson's services until same were fully completed.

All the Mining Co. did was to authorize its officers to transfer to the Senonac Power Company all its water rights in California.

Obtaining options on land for the purpose of controlling the water rights of a particular canyon can not, by any stretch of the imagination, be held to be in the line of the usual and ordinary business of a Mining Co., especially in view of the fact that the record discloses that the company was desirous of disposing of the water rights it did own.

The whole power scheme is apparent to any person of ordinary intelligence. Nones and Anderson saw that in effecting a sale of the Mining Co.'s rights that in all probability adjoining properties would be necessary in order to round out the holdings. They, therefore, secured options in their own names on some of these properties as in their judgment might be required.

The price which the Mining Co. authorized its water rights to be sold for was $200,000. The price which Nones was negotiating for was $325,000. If a sale had been effected at this price for the Mining Co.'s water rights and also the options held by Anderson and Nones, does the court think for a moment that the Mining Co. would have received the entire selling price? Not a cent in excess of the $200,000 would have been paid to the Mining Co.; $125,000 would have represented the price of the options held by Anderson and Nones which the Mining Co. could not claim or controvert as it had not authorized or directed Nones to secure same in its behalf. The power deal was nothing but a scheme on the part of Anderson and Nones to make

a profit for their own account which they were unable to put through.

Anderson having failed to realize any profit on either the railroad or the power project, and being unable to collect the $4500 from Nones, endeavors in this action to compel the Mining Co. to pay for services performed in matters which were entirely outside of and beyond the powers conferred upon the Mining Company by its charter.

In concluding this branch of our argument we say, in all sincerity, that there is not a scintilla of evidence that the Mining Co. ever authorized Nones to employ Anderson for any purpose whatever, and likewise, there is not a scintilla of evidence that the Mining Co. ever held Nones out to the public as possessing ostensible authority to engage in any enterprise outside of the usual and ordinary business in which it had been engaged for more than fifty years.

A collateral legal question arises in connection with the consideration of this subject which necessitates a reversal of the judgment.

The California Code requires that a plaintiff prove his case by a preponderance of the evidence and as the burden of proof rested upon Anderson we submit that he failed to make out a case which will sustain the judgment in his favor.

Two witnesses, Anderson and Nones, both for plaintiff in the court below, contradicted each other squarely. Neither was impeached and they stand

on an equal footing. One balances the other. Under such condition can it be said that Anderson has made out a case?

But to clinch our contention, all the documentary evidence corroborates Nones' testimony,—the letter to the committee,—Nones' report to the Mining Co., —the minutes of the company,—the written promise of Nones to pay Anderson $4500—and finally, Nones' testimony not denied by Anderson that he had received a letter from Anderson in which Anderson had recognized that it was a personal matter and not corporate.

Aside from this, the lower court had no right to reject Nones' testimony and accept the testimony of the party in interest. Anderson produced Nones as a witness in his favor. Doing so, he vouched for him to the court. Fortunately the appellate courts of California have dealt with this precise question. In Zipperlen v. Southern Pacific Company, Cal. App. Dec. 206, page 215, the court said:

> "The authority by which a party in this state is allowed to contradict his own witness, or show that he has made at other times, statements 'inconsistent with his present testimony', is found in section 2049 of the Code of Civil Procedure. That section also provides that 'the party producing a witness is not allowed to impeach his credit by evidence of bad character'. And, as seen, we think that the section was not intended as authority for the impeachment by any means of one's own witness, in the true legal sense of that term. The reference in that section to section 2052 of the same code merely means, we think, that before be-

ing permitted to prove that his witness has made previous inconsistent statements, the party must lay the foundation as provided by the last mentioned section—that is, must give the witness a chance to refresh his memory by calling his attention to the 'circumstances of times, places and persons present,' when and before whom such alleged inconsistent statement is claimed to have been made.

There are, however, certain qualifications to the rule established by section 2049, supra, and which it is indispensably necessary should be strictly observed, lest some other important rule of evidence be violated. First, the witness must give testimony damaging to the party producing him. Secondly, it must appear that the party by whom the witness has been produced has been misled and taken by surprise, and that he had reason to believe that the witness would give testimony favorable to his side. *A party producing a witness virtually stands as an indorser of the character of such witness, and by the act of calling him to testify in his behalf in effect declares to the court and jury that the testimony of said witness will strengthen and support his contention; so, when the witness gives evidence which tends to destroy rather than build up the cause of the party who has presented him to the court and jury as a person possessing information valuable and material to his side of the controversy,* the law steps in and says that no litigant should thus be placed at the mercy of such treachery, and authorizes the party to explain why he called him as a witness and thereby acquit himself of the otherwise disadvantageous imputation of contributing toward making out a case against himself. But a party, under the guise of the rule in question, will not be suffered to present to the jury mere hearsay declarations—declarations admissible neither under the rule *res*

gestae nor as having been made in the presence and hearing of the party against whom they are offered. The statement, the admission of which under the indicated circumstances is here claimed to have been prejudicially erroneous, could not, it is obvious, have gone into the record either as part of the *res gestae* or as a declaration in the presence and hearing of the opposite party. If it was not admissible for the purpose of 'contradicting the witness', or of showing that he at another time made statements 'inconsistent with his present testimony', to the end that the party might explain why he introduce him as a witness, then it was incompetent for any purpose, because, if admitted, though a mere naked hearsay declaration, it would erroneously go before the jury as independent evidence.

We are aware that some early cases were disposed to hold that such testimony was admissible under no circumstances. We have not taken the trouble to ascertain whether, at the time of the filing of the opinions to which we refer, section 2049 of the Code of Civil Proceedure, as it now reads, was a part of our law of evidence; but we would be unable to reconcile the intimation in those cases with the language of the section as it now exists. There is no reason upon principle why a party should not be allowed to contradict his own witness if the latter has betrayed such party and by his unexpected testimony placed the party producing and standing sponser for him in a false light before the court or jury. There is every reason in principle why such a practice should be upheld, where it is clear that it has not been abused. Moreover, the legislature has recognized the soundness of the principle.

The questions, then, determinative of the admissibility of the testimony here are: Did the witness give testimony adversely to the plain-

tiffs, for whom he was called to testify? If so, does it reasonably appear that the plaintiffs were taken by surprise because of the nature of the testimony given by said witness?"

In Hopkins v. White, 20 Cal. App. 234, at page 239, it is said:

"The evidence adduced to establish fraud and want of consideration is to be found in the testimony of the defendants who were the only witnesses to the facts relied upon as establishing the averments of the complaint. *In considering their testimony these witnesses are to be treated as having been voluntarily produced by plaintiff, vouching for their competency and credibility.* The rule would not estop plaintiff from calling other witnesses to dispute their statements but this was not attempted. Some minor statements of the witnesses, apparently inconsistent with their positive statements of material facts, may be discoverable in their testimony, but these latter can not for that reason be set aside and disbelieved. The conclusions deducible from positive statements of facts showing bona fides are not to be shaken by some comparison of inconsistent statements with each other, unless these inconsistencies tend directly to establish the issues of fraud and want of consideration and clearly dispute the evidence of good faith. An instructive discussion of the rule is found in Clark v. Krause, 2 Mackey (D. C.) 559-571. We quote 'The analogies, as well as the reason of the law, are against the ascription to the defendant of any special obligation in giving his personal testimony on demand of the complainant to create a case for his opponent by acquiescing in the imputation of bad faith while the charge remains unsupported by the testimony of a single adverse witness, or that unfavorable inferences are to be drawn from his failure to strengthen

circumstances of alleged suspicion, supposed to be inconsistent with his positive statements.' (Citing Lingan v. Henderson, 1 Bland. (Md.) 268; Alexander's Practice, 72; 2 Daniell on Chancery, p. 451). Fraud may be inferred from circumstances but it cannot be left wholly to conjecture. (Kerker v. Levy (140 App. Div. 428, 125 N. Y. Supp. 357).)"

See also:

Hammond v. McCullough, 159 Cal. 639;
Fanning v. Green, 156 Cal. 279;
Quick v. U. S., 140 U. S. 417.

Defendant in error having thus vouched for the credibility of Nones as a witness, the lower court was not justified in rejecting or disregarding his testimony. It was bound to accept it. The judgment rendered proves that Nones' testimony was either rejected or not considered. For this reason also the judgment is manifestly erroneous and should be set aside.

II.

RATIFICATION.

Inasmuch as this element, ratification, would be sufficient to sustain the judgment, if proven, we are taking the precaution of presenting the matter fully so as to satisfy this court that this element as a matter of proof and as a matter of law, is lacking in this case.

A ratification of an agent's authority can be made only in the same manner required for the con-

ferring of original authority, in other words, a corporation may ratify any act which it might have done in the first instance.

Salfield v. Sutter County Land Co., 94 Cal. 546;
10 Cyc., 1069.

While the authorities are not in harmony with respect to the question, the general rule is believed to be that a corporate act or contract can not be validated by ratification either

1. *Where the act or contract was wholly in excess of the powers of the corporation express or implied,* or—

2. *Where it was prohibited by positive law.*

10 Cyc., 1070, Note 43;
McCracken v. S. F., 16 Cal. 591;
Central Trans. Co. v. Pullman's Palace Car Co., 139 U. S. 24.

It is well established that ratification must take place with full knowledge of the circumstances.

10 Cyc., 1079.

The Supreme Court of California, in the case of Blood v. La Serena Land and Water Company, 113 Cal. 221, carefully considered *the elements of a legal ratification* by a corporation of a contract originally defective and voidable for lack of power and authorization and *distinguishes* ratification from estoppel. The court, speaking through Mr. Justice Henshaw, used the following language:

"Ratification is thus a question of legal cognizance."

The Supreme Court of California, in the case of Gribble v. Columbus Brewing Co., 100 Cal. 67, states the law as follows:

> "Corporations, equally with individuals, are subject to the rule that where, *with full knowledge of all the facts involved, a principal reaps the fruit of an unauthorized contract of his agent,* and for some time yields *acquiescense* to its provisions, he will be deemed to have ratified it, and will be estopped as against one who has fully performed the contract on his part from repudiating it to the injury of the latter."

It is plain, therefore, that there is no liability in this case because of a ratification by the Mining Co., first, because it could not ratify an act which it did not have the power to enter into in the first instance, and, secondly, conceding power to ratify, there is no evidence of a ratification by it *with knowledge of all the facts* and circumstances of Anderson's employment.

III.

ULTRA VIRES.

No extended argument, in our judgment, on this phase of the case is needed. A mere comparison of the charters of the Mining Co. and the Railroad Co. and the Power Co. should be sufficient to conclusively sustain this contention. For the purpose of assisting the court in this comparison we submit the following authorities as decisive of the question:

"The contract of a corporation, which is unauthorized by, or in violation, of its charter, or other governing statute, is entirely outside of the scope of the purposes of its creation and is void, in the sense of being no contract at all, because of a total want of power to enter into it; that such contract will not be enforced by any species of action in a Court of Justice; that being void, *ab initio,* it can not be made good by ratification or by any succession of renewals and that no performance on either side can give validity to the unlawful contract or form the foundation of any right of action upon it."

10 Cyc., p. 1146.

The reasons underlying the doctrine of *ultra vires* are clearly stated by Mr. Justice Gray in an opinion of Supreme Court of the United States, 131 U. S. 371, to wit:

"The reasons why a corporation is not liable upon a contract *ultra vires,* that is to say, beyond the powers conferred upon it by the legislature and varying from the objects of its creation, as declared in the law of its organization, are

1st. The interest of the public, that the corporation shall not transcend the powers granted.

2nd. *The interests of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter and therefore not authorized by the stockholders in subscribing for the stock.*

3rd. The obligation of every one entering into a contract with a corporation to take notice of the legal limits of its powers."

This subject in California is controlled by Article 12, Section 9, of its Constitution, which provides as follows:

> "No corporation shall engage in any business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized."

The Supreme Court of California in the case of The People v. Stockton Savings & Loan Society, 133 Cal. 611, has declared this provision to be a *mandatory* and *prohibitory and self-executing.*

It is elementary that persons dealing with corporations are bound to take notice of their powers.

It is likewise elementary that the authority of agents of corporations is necessarily *limited* to such contracts as the corporation *may lawfully make* and to such acts as the corporation *may lawfully do* and that *it can not be presumed* that the agents of corporations have authority to transact business which the corporation was not, by its charter, authorized to engage in.

10 Cyc., p. 946;
Alexander v. Cauldwell, 83 N. Y. 480.

In the case of Knowles v. Sandercock, 107 Cal. 629, the court had occasion to deal with a kindred question, to wit, the right of a corporation to deal in stocks or to become a stockholder in another corporation, and held:

> "*A private corporation has no implied authority to invest in shares of another corporation and in this State a corporation is forbid-*

> *den to engage in any business other than is expressly authorized in its charter or the law under which it is organized,* and a corporation organized for the purpose of manufacturing, importing, buying and selling furniture and upholstery, cannot hold stock in a hotel corporation, and its subscription to its stock is *ultra vires* and void, and it can not be charged with liability as a stockholder of the hotel corporation."

This decision expresses the true rule and the law governing this case. If it is unlawful for one corporation to deal in the shares of another corporation, it is likewise unlawful for a corporation,—in the absence of express authority so to do,—to organize another corporation.

The purposes of the proposed railroad, to wit, *"to engage in and conduct the business of a carrier of passengers, freight, mail and baggage and express for compensation,"* is so foreign to any purpose authorized by the charter of the Mining Co., that we submit this phase of the question without further argument.

We confess it difficult to understand how the Power Co. can possibly be included within the powers conferred upon the Mining Co., for it must be conceded that such powers possessed by it, to wit:

> "to generate, manufacture, purchase and transmit electricity * * * for supplying * * * electric power * * * light, or heat, etc.,"

could not possibly be included within the power conferred upon the Mining Co. by its charter. *Such*

powers were not known or thought of when its charter was granted in 1866.

Being obviously an *ultra vires* enterprise, it was and is impossible for the Mining Co. to engage in any such enterprise, much less authorize its agent to do so in its behalf.

> *"An ultra vires or fraudulent act can not be ratified by the majority so as to bind the minority; neither can it be ratified by the Board of Directors."*
>
> Cook on Corporations, p. 2412, § 733.

For this reason the judgment must be reversed and entered in favor of the Mining Co.

In closing this brief we direct the court's attention to the opinion rendered by the learned judge of the court below. We do not question the legal principles therein set forth, but we do question the court's conclusions as to the facts of this case applicable thereto.

The learned judge quoted with approval from St. Louis Company v. Wannamaker, as follows:

> "Apparent authority is such authority as a reasonably prudent man, using diligence and discretion, *in view of the principal's conduct,* would actually suppose the agent to possess * * *.
>
> Viewing the *apparent paramount authority of Nones* * * * and considering it in relation to and with the equally apparent co-operation, acquiescence and participation of Tatham, the general manager, * * * would not be justified in arriving at the conclusion that they were possessed of all the authority nec-

> essary to employ him for the purposes indicated."

The logic of this leads to but one inevitable conclusion, to wit, that the Mining Co. is liable regardless of any part taken by it in reference to the matter,—whether it knew or whether it was negligent. If its agents held themselves out as possessing paramount authority as directive heads of the corporation, then the corporation is liable regardless of any act done by it. Such a conclusion is untenable and is not in harmony with the authority which the court cites, as it ignores entirely the language of the court, to wit: *"in view of the principal's conduct."*

A careful reading of the opinion discloses no evidence of anything done by the Mining Co., expressly or impliedly, which might be termed *"the principal's conduct"* in reference to the subject matter. In fact the court says:

> "It may be and probably is true * * * that the employment of the plaintiff for the purposes indicated by Nones * * * was without direct and precise authority emanating from the Board of Directors and perhaps without knowledge on their part as to such employment, or its consequences."

It is apparent from the authorities quoted that something must have been done by the Mining Co. which in law might be termed *such conduct as would authorize "the apparent paramount authority of Nones."*

We have carefully examined the authorities cited in the opinion and we most respectfully submit that they do not sustain the conclusions for which they were cited.

The case of Dover v. Pittsburg Oil Co., 143 Cal. 501, cited in the opinion, is not in point. In this case the owner of certificates of stock *ratified* an endorsement thereof in his name *by an ostensible agent* and informed the secretary of the corporation that the endorsement was *all right.*

The case of Southern Pacific Company v. City of Pomona, 144 Cal. 339, is also not in point for the reason that the railroad company was bound because the authority conferred on its agent was *unquestionably ostensible* and was *not questioned or denied* by the company, such agency having been *intentionally* engendered by the principal.

The case of Dickerson v. Colgrove, 100 U. S. 618, merely declares a principle of law that he who by his language or conduct leads another to do what he would otherwise not have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

If there was any language or conduct by the Mining Co. upon which Anderson relied, or which induced or warranted him in believing that Nones was possessed of full and complete authority, then the authority cited would be applicable. We do not quarrel with legal principles but we do insist that there is no evidence of anything done or said by

the Mining Company which clothed Nones with paramount authority, or which warranted Anderson in so believing.

In conclusion, we repeat there is not a scintilla of evidence that the Mining Co. ever authorized Nones to employ Anderson for any purpose whatever; there is no evidence that it ever held Nones out to the public as possessing ostensible authority to take options in its behalf and therefore as possessing authority to employ agents to assist him; there is no evidence that it knowingly received or accepted any benefits flowing from Anderson's services; there is no evidence that it ever ratified or approved his alleged employment after full knowledge of all the facts; and finally, there is no evidence of any benefits or any fruits of Anderson's services received or retained by the Mining Co. On the contrary, the evidence discloses that no benefits were received or enjoyed by it and that it suffered actual loss by the unauthorized use of its funds in these enterprises.

To sanction a recovery under circumstances disclosed by this record would so endanger corporate business as to compel iron clad rules limiting the liability of corporate officers, thereby hampering business freedom in ordinary and usual corporate business, otherwise, every corporation would be absolutely at the mercy of its president and any designing or unscrupulous president could bankrupt his company.

Inasmuch as Anderson was bound to know the extent of the powers conferred upon the Mining Co. by its charter, and the extent of the authority conferred by it upon its officers, he is not permitted to recover for such services unless the Mining Co. has, with knowledge, accepted and retained and enjoyed the benefits of his services.

There being no proof to this effect, we submit that the judgment must be reversed and judgment ordered in favor of the plaintiff in error.

Dated, San Francisco,
May 12, 1917.

Respectfully submitted,

A. H. JARMAN,
Attorney for Plaintiff in Error.